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No. 743

IN THE

SUPREME COURT OF THE UNITED STATES

..... TERM, 195....

NEVIL C. WITHROW COMPANY ..... *Petitioner*

v.

W. R. GRIMSON COMPANY AND
NATIONAL SURETY COMPANY ..... *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

COOPER JACOWAY

Counsel for Petitioner

PARAGON PRINTING CO., LITTLE ROCK

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Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in the above case on October 21, 1957, in which a rehearing was denied on November 15, 1957.

CITATION TO OPINIONS BELOW

The Opinion of the Court of Appeals for the Eighth Circuit for the above case is reported in 248 F.(2) 896.

JURISDICTION

The Judgment of the Court of Appeals for the Eighth Circuit was entered on October 21, 1957. A timely Petition for Rehearing was filed and was denied on November 15, 1957. The jurisdiction of this Court is invoked under 28 U.S.C.A. Section 1254(1).

QUESTION PRESENTED

Was the Court of Appeals for the Eighth Circuit correct in declaring that the contract between the parties contained no ambiguous terms and presented no question of fact?

STATEMENT

The University of Arkansas employed the Grimshaw Company to construct, in accordance with certain plans and specifications, a large six story Medical Center in Little Rock, Arkansas (R.113-121). The various sections of the Specifications were identified with letters instead of numbers. Section J (R.30) called for ornamental aluminum which involved several items, including aluminum sills. Section M (R.33) related to the windows.

The Grimshaw Company employed the Withrow Company by subcontract to furnish the aluminum windows required in Section M of the Specifications (R.9,11).

For purposes of convenience, we would like to refer to these agreements respectively as the First Contract and the First Subcontract.

In the First Contract the Grimshaw Company was required to furnish both the Section J and the Section M items, but Withrow agreed only to furnish Section M items.

Later, the University of Arkansas gave a second contract to the Grimshaw Company to construct a seventh floor on the original building (R.129). The seventh floor was not to be constructed as completely as the other six stories; the Grimshaw Company was required to furnish only the Section M items and was not required to furnish the Section J items. The Grimshaw Company then gave a Second Subcontract to the Withrow Company to furnish the Section M items for the seventh floor (R.13,15).

The two subcontracts that the Grimshaw Company gave the Withrow Company used identical language in all their requirements and were identical except for the amounts of money involved and except for the fact that one related to the first six stories and the other related to the seventh story. The contracts were on forms prepared by the Grimshaw Company.

During the course of construction, the Grimshaw Company required that the Withrow Company furnish, in connection with the First Subcontract, aluminum window sills and insisted that they were required under Section M of the Specifications of the contract (R.48-66). Although the two subcontracts were identical in language and requirements, it is most significant that the Grimshaw Company made no such contention and imposed no such requirement in connection with the Second Subcontract and it is most significant also that in its Second Main Contract the Grimshaw Company did not furnish the window sills (R.131).

The Withrow Company protested that it was not obligated to furnish the aluminum window sills. The Grimshaw Company refused to submit the matter to arbitration or to a test suit and threatened the Withrow Company with cancellation of the entire contract or back charging the work unless Withrow furnished the sills. Such a procedure would have confronted the Withrow Company with bankruptcy and in the face of that economic duress Withrow furnished the sills (R.69).

When the work was completed, Withrow then brought the instant suit against the Grimshaw Company seeking compensation for the window sills it furnished and setting up that the sills were not a part of the items required under Section M of the Specifications; that the sills were not required under the Subcontract; and that Withrow

furnished them only because of the coercion and economic duress exerted by the Grimshaw Company against it.

At the trial a great deal of testimony was introduced as to the meaning of the word "sill". It was developed that the "sill" has at least two separate meanings in connection with windows. One meaning is that it is the bottom member of the window unit containing the glass or transparent substance. Another meaning is that it is the shelf like surface extending at right angles from the window opening and parallel to the floor, ordinarily known as a window sill (R.39). The architect whose firm prepared the plans and specifications testified that under the Specifications, window sills were called for in Section J and not in Section M of the Specifications (R.108). The building superintendent for the Defendant admitted that the term "sill" as used in Section M had different meanings at different places (R.144,145) and that necessarily it was an ambiguous term.

The District Court considered that "sill" was an ambiguous term in the Subcontract and submitted to the jury the question of its meaning.

The Court submitted the case to the jury on three interrogatories (R.26). The first interrogatory was:

> "Was the Plaintiff obligated, under the contract, to furnish the sills in controversy?"

The jury answer was:

> "No"

The second interrogatory was:

> "Was the Plaintiff under duress when he furnished the sills in controversy?"

The jury answer was:

> "Yes"

The third interrogatory was:

> "What amount is the Plaintiff entitled to recover for furnishing and installing the sills?"

The jury answer was:

> "$20,000.00"

Judgment was accordingly entered (R.27).

Thereafter the Grimshaw Company took an appeal to the Eighth Circuit. They appealed only on the duress question. The Grimshaw Company did not take any appeal from the action of the Court in submitting the case to the jury as to the meaning of the contract. The limited nature of the Grimshaw Company's appeal is clearly demonstrated by the headings used in the argument in their brief.

Those headings were:

I

"The Court erred in overruling the demurrer to appellee's evidence and in denying appellants' motion for a directed verdict" (Appendix A 21). (Under this Point, the Grimshaw Company concerned itself only with the duress question.)

II

"Where there is a bona fide dispute between a general contractor and a subcontractor as to certain requirements of the contract between them, the subcontractor's deliberate offer to settle the dispute, made without fraud, accident or mistake, accepted and acted upon by the general contractor, will not be set aside for duress" (Appendix A 21). (The scope of this argument is clearly suggested by the heading.)

III

"Where a subcontractor, with full knowledge of all of the facts, and in order to settle a lengthy dispute as to the requirements of his subcontract, agrees to perform, and thereafter does perform in accordance with the prime contractor's interpretation of the contract, and the subcontractor accepts the benefits of such settlement, he cannot thereafter avoid his offer as having been obtained under duress" (Appendix A 21). (The scope of this argument is clearly suggested by the heading.)

The Withrow Company's brief was directed only to the issue involved only in the duress question. The oral argument before the Court was directed only to the matters contained in the briefs.

The Court of Appeals rested the substance of its decision on the ruling that the contract between the parties was unambiguous; that the First Subcontract required Withrow to furnish the window sills in question (Appendix A 21); and that the District Court erred in submitting the issue to the jury.

This Petitioner seeks to come to this Court for the reason that the contract between the parties was ambiguous under the decisions of the Supreme Court of Arkansas. The Court of Appeals has reached a result in square conflict with decisions of the Arkansas Supreme Court; and the error of the Court of Appeals should be corrected in this Court in order that justice may be done to all the parties.

The contract was demonstrably ambiguous. Its terms were not clear and were subject to a variety of meanings. Under decisions of the Supreme Court of the State of Arkansas and for that matter, in accordance with the general accepted common law, the ambiguity in the con-

tract should have been and was properly submitted to the jury for a decision and the Court of Appeals erred in substituting its judgment for the judgment of the jury on the key issue of fact.

REASONS FOR GRANTING THE WRIT

Grimshaw employed Withrow to install windows in the Medical Center Buildings. During the course of installing the windows Grimshaw required Withrow to furnish the window sills, in addition to the windows themselves. From the outset, Withrow insisted that his contract did not require him to furnish the window sills. When all the windows and window sills were installed, Withrow requested Grimshaw to pay it for the window sills as extras to the contract. When Grimshaw refused to pay, Withrow brought the instant suit in the Federal District Court. One of Grimshaw's defenses was that Withrow's subcontract required it to furnish sills; and that that requirement obligated Withrow to furnish window sills. The trial court held that the contract was ambiguous because the term "sill" was ambiguous; and the Court submitted to the jury the question as to whether Withrow was obligated to furnish window sills. They jury found that the contract did not require Withrow to furnish the window sills; and judgment was entered for Withrow for the value of the window sills it had furnished.

On appeal, the Eighth Circuit reversed the judgment and held that the contract was not ambiguous.

The Court of Appeals departed from the applicable State law in ruling that the contract terms were not ambiguous.

Petitioner does not question the principle of law that a contract, when free from ambiguity, presents no jury question. In such a hypothetical situation, the Court construes it and determines its legal effect.

But it is equally true that a contract, when containing ambiguous terms, or terms with multiple meanings, presents a question of fact to be resolved only by the jury as the trier of the facts.

This Petitioner expects to demonstrate that the contract in question contained an ambiguity in a major term: that is, the different meanings of the term "sill" as used in different sections of the building contract. This Petitioner expects to establish to this Court's satisfaction that the decisions of the Supreme Court of Arkansas required that the ambiguity be resolved by a jury as a question of fact. When this Petitioner has done such, it respectfully petitions this Court to exercise its discretion to grant certiorari to correct the misapplication of the Arkansas law by the Court of Appeals.

The terms of Section J of the Specifications are set out at page 30 of the Record. The terms of Section M of the Specifications are set out at page 33 of the Record.

Withrow was bound to furnish the Section M items. Withrow had no duty to furnish the items required in Section J of the Specifications. The term "sill" is found and required in both Section J and in Section M. It referred to different things in the two sections. The major question in this case then turned on the meaning to be given to the word "sills" as found in Section M.

The term "sill" does not have a fixed and definite meaning. It has several meanings, both by definition and as a technical term in a technical field.

Webster's Unabridged Dictionary gives this definition:

> ". . . c. The timber or stone on which a window frame stands; or the lowest piece in a window frame. . . ."
>
> Webster's New International Dictionary
> Second Edition Unabridged
> Copyright 1934 by K. & C. Merriam Company
> The Riverside Press, Cambridge, Mass., U.S.A.

This is the meaning that Withrow gave to the term. Grimshaw claimed a different meaning for it.

Both Mr. Withrow and Mr. John Rauch, the Architect whose firm prepared the Specifications, testified that the term sill had various meanings at different places in the Specifications. One meaning is that of the bottom (lowest) member of the window frame; the other is that item commonly known as window sill.

Mr. Withrow, the President of the Plaintiff Company, testified. He was shown a metal window that was substantially similar in type to the windows installed in the Medical Center. He identified and demonstrated the various parts of the window. The Respondent has summarized his testimony as follows:

> "The vent or sash has four component parts. It holds the glass. The two sides or stiles are the vertical parts. The top is the top rail and the meeting rail becomes the sill, because it is the bottom vent. These sashes are in a frame which is composed of four members, the sides being called jambs, the top is called the head and *the bottom part the sill of the window.* Most windows seen in homes have *a little flat surface that projects at right angles to the sill of the frame and makes a sort of a shelf. This is generally called a window sill or stool.* On the interior, it is the stool, on the outside it is called the window sill.
>
> "(The witness then produced some metal parts as a representative sample of parts of the window sill furnished for the Medical Center, defining the stool or interior sill, etc.)" (Emphasis supplied) (R.39).

The witness draws a sharp distinction between the component bottom part or sill of the sash on the one hand, and the window sill on the other. The bottom member

of the window sash is the sill of the window. It is obviously and plainly a completely different thing from the window sill. The Grimshaw Company clearly recognized this distinction and separation when it went to Mr. Will Erwin (one of the Defendant's witnesses) and prepared to buy from Mr. Erwin window sills that were completely separate and apart from the windows made by the Withrow Company's supplier (R.156).

Mr. John Rauch is a name member of the architectural firm that prepared the plans and specifications for the Medical Center. He differentiated between the sill of the window and the window sill and stated that the window sills were not included in the requirements of Section M but that they were included only in the items to be furnished in compliance with Section J (R.108).

Mr. R. W. Saenger, who was the direct representative of the Grimshaw Company in charge of the construction of the Medical Center testified (R.143).

On cross-examination he was required to admit that the term "sill" as used in different parts of the Section M Specifications had different meanings (R.144,145).

The Record clearly discloses that all parties recognized and conceded the fact that the word "sill" possessed different meanings when used in different parts of the Specifications.

Consequently, its meaning could not be determined solely from the word itself, it was necessarily an ambiguous term; and it made the contract ambiguous when and where it was employed.

> "Whenever the terms of a contract are susceptible of more than one interpretation or an ambiguity arises, or the extent and object of the contract cannot be ascertained from the language employed, parol

evidence may be introduced to show what was in the minds of the parties at the time of making the contract and to determine the object on which it was designed to operate."

20 Am. Jur., Section 1147, Evidence p. 999.
See 55 Am. Jur., Usages and Customs,
Section 30, p. 290

The word sill, when found in the contract, is honestly and sincerely and clearly susceptible of more than one interpretation. It is ambiguous and it renders the contract ambiguous.

The Arkansas Supreme Court has plainly and repeatedly stated that ambiguities in contracts are not to be resolved by the court, but are to be resolved only by the jury.

"The trial court should have submitted the case to the jury to determine the meaning of the contract between the parties. When a contract is definitely shown, and the language therein contains no latent ambiguity, it is the duty of the court to construe the contract. But, when the contract has a latent ambiguity, the question of the meaning of the contract should be submitted to the jury."

Bailey v. *Sutton*, 208 Ark. 184, 186,
185 S.W. (2d) 276

Petitioner submits that the Court of Appeals, in taking the instant case from the jury, misconstrued or ignored the express directions of the Arkansas Supreme Court.

"We have held that when a written contract is ambiguous its meaning should be left to the jury. *Agey* v. *Pederson*, 191 Ark. 497, 86 S.W. (2d) 930. Here the Court followed that course, and the verdict concludes this issue."

Triska v. *Savage*
219 Ark. 80, 82, 239 S.W. (2d) 1018

"In our opinion the contract is not so clear and free of ambiguity that the court could say what it

> meant as a matter of law. In a situation of this kind it must be left to a jury to determine what was the intention of the parties. Ordinarily it is the duty of the Court to construe a written contract and declare its meaning to a jury, but where there is a latent ambiguity, parol evidence is admissible to explain the meaning of the parties, and then it is a question for the jury and should be submitted to a jury. Regardless of whether the ambiguity is patent or latent, if the intention of the parties is not clear, it is a question for the jury."
>
> *Fort Smith Appliance & Service Co.* v. *Smith*
> 218 Ark. 411, 414, 236 S.W. (2d) 583

This requirement is even more stringent when as in the instant case, the ambiguity arises from the use of a technical term.

"Sill" is a technical term as the dictionary definition demonstrates and as the parties themselves recognized. As such technical term its meaning should, under the decisions of the Arkansas Supreme Court, be resolved only by the jury.

> "But where the contract contains words of latent ambiguity, or where technical terms are used or terms which, by custom and usage, are used in a sense other than the ordinary meaning of the words, oral testimony is admissible to explain the meaning of the terms or words used, and the question may be submitted to the jury to determine in what sense they were used."
>
> *Paepcke-Leicht Lumber Co.* v. *Talley*
> 106 Ark. 400, 409

Completely apart from the foregoing, however, there is another and separate element in the case, which we believe the Court of Appeals for the Eighth Circuit has overlooked, and which in its own way demonstrates the error reached by the Court of Appeals in its decision of

October 21, 1957. There were really two contracts between Withrow and Grimshaw. The first was dated September 26, 1951, but mailed by Grimshaw to Withrow on October 23, 1951 (R.9,11,44). The second contract was dated June 8, 1952 (R.13-15).

The history of these two contracts is: The University of Arkansas originally employed the Grimshaw Company to construct a Medical Center of six floors. The floors were to be complete and the contractor was required to furnish the items called for in Section J and M of the Specifications. After the Grimshaw Company received that contract, it then entered into the first contract with Withrow. The University of Arkansas then entered into a second contract with the Grimshaw Company for the construction of an incomplete seventh floor (R.128,129). In the second contract between the University and Grimshaw, Grimshaw was not required to furnish the window sills that it was required to furnish for the first six floors under its first contract.

A comparison of the two contracts between the Grimshaw Company and the Withrow Company show that they were identical in all of their terms and requirements with the exception of the amounts and the floors involved. The two contracts between Grimshaw and Withrow, however, required Withrow to furnish exactly the same type and scope of materials.

Yet Withrow did not furnish and was not asked to furnish window sills in connection with the seventh floor, and Grimshaw did not furnish, and was not required to furnish window sills in connection with the seventh floor. This was the meaning given the second contract by every one. It was Withrow's construction of the contract: it was Grimshaw's construction of the contract; it was the Architect's construction of the contract and it was the construction given by the University of Arkansas Trustees.

Despite that, and although the two contracts were identical, the Grimshaw Company then demanded that Withrow furnish more under the first contract than it even contended was due under the second contract. This difference grows solely out of the fact that in the contract for the first six floors, as signed by Grimshaw and the University of Arkansas, Grimshaw was required to furnish the window sills that it later coerced Withrow into furnishing. The Grimshaw Company was not obligated to furnish the window sills for the seventh floor.

The parties themselves were dealing with technical terms in a technical field. By their own construction, they established that Section M of the specifications did not require the furnishing of the window sills. Grimshaw simply seized upon Withrow's financial necessities to coerce Withrow into furnishing something that Withrow never intended to furnish and which the contract did not require him to furnish.

The parties themselves have construed the Section M requirements to mean something completely different from what the Court of Appeals has said those requirements mean.

The construction given by the parties themselves to an ambiguous contract should prevail in the resolution of the meaning of that contract.

Craig v. *Thompson* (1949), 177 Fed. (2d) 457, 460.

This is more than a situation where the parties cannot agree on the meaning of the contract. In this case, the Grimshaw Company cannot itself achieve a consistent interpretation. That Company claims one meaning when it is to its benefit, and a completely different meaning when the different meaning benefits it.

The Withrow construction of the contract is at all times the same. With these actual differences in interpretation, how can it be claimed that the contract is not ambiguous?

In view of the conflicting and inconsistent interpretations placed by Grimshaw itself on the meanings of the contracts, we submit that, in fairness to the parties, the least that can be said about these contracts is that they and their terms and meaning were ambiguous. That being so, their interpretation was properly a matter for the jury.

The Grimshaw Company prepared the contract that Withrow signed. Whenever there is any confusion as to the meaning of the terms of a contract or a lack of clarity as to the exact meaning of that term, the doubt is to be resolved against the party preparing the contract.

> "It was Triska's attorney who drafted the contract. Triska complains of an instruction by which the court told the jury that if there were any ambiguity in the contract it was to be construed against the party who had prepared it. This is a correct declaration of a familiar rule of law, and we find no error in the giving of such a charge. In a number of cases similar instructions concerning the interpretation of ambiguous contracts have been approved."
>
> *Triska* v. *Savage*
> 219 Ark. 80, 82
> 239 S.W. (2d) 1018

This Petitioner asks only that to which he is entitled under the express decisions of the Arkansas Supreme Court. The contract provisions in question were ambiguous and susceptible of several interpretations; and Withrow was entitled to have that ambiguity resolved by the jury as a question of fact.

The Court of Appeals, by its decision in this case has denied the Petitioner the opportunity to have the jury determine the key question of fact.

The Court of Appeals has given one construction to the contract. That construction is not, however, the only construction that can honestly and objectively be made of the contract terms. So long as it is not the only construction of which the contract is fairly susceptible, the Circuit Court has exceeded its powers and has attempted to substitute its decision for the decision of the jury. This, Petitioner respectfully submits, The Court of Appeals cannot do.

> "In considering the question whether there was substantial evidence to sustain a verdict for the Plaintiff we must presume the evidence presented in her behalf is true and she is entitled to the benefit of all favorable inferences that may reasonably be drawn from the evidence. . . . If, when so considered, fair-minded men might honestly and reasonably draw different conclusions, this court will not substitute its judgment for that of the jury. . . ."
>
> *Aetna Life Ins. Co.* v. *McAdoo*
> (1940) 115 F.(2d) 369
>
> *Kroger Grocery and Baking Co.* v. *Reddin*
> (1942) 128 F.(2d) 787.

> ". . . the respondents were not free to relitigate the factual issue in a reviewing court. Under these circumstances it would be an undue invasion of the jury's historic function for an appellate court to weigh the conflicting evidence, judge the credibility of witnesses and arrive at a conclusion opposite from the one reached by the jury."
>
> *Lavender* v. *Kurn*
> 327 U.S. 645, 66 St. Ct. 740, 90 L. ed. 916

The record affirmatively demonstrates that Withrow never intended to furnish the window sills under his contract to furnish the Section M items.

Before he was ever given his subcontract, he submitted bids to the Grimshaw Company on a number of items—the Section M items, the Section J items, and other items. His bid on all these items is shown in the Record beginning at page 41. His bid on the Section M items was $335,000.00. His separate bid on the Section J items was $30,500.00. (That is the item found on R.43 and entitled "Aluminum Hoods and Sills and Stools".) He was given the contract for $335,000.00 for the aluminum windows. Neither he nor Grimshaw expected that the window sills would be furnished as a Section M item. There would have been no occasion to have made separate bids on the separate section items unless both the parties had considered the window sills separate from the windows.

The Court of Appeals in reaching a conclusion adverse to Withrow seems to have been impressed by paragraph 3 of Section 10 of the Specifications. This is quoted in the Court's Opinion and is found in the Record at page 34. Yet this contract requirement bears no necessary relation at all to the window sill question. It was not done by Withrow as part of his contract; and he submitted a completely separate and independent bid in connection with it (R.42 see "Item 3—Waterproofing, Dampproofing and Caulking . . .").

Basically the Specifications are instructions given to the general contractor. Since the instructions are to the contractor, there is always the possibility of a certain amount of overlap, as, when items required under a separate section of the Specifications, tie into items covered in still another section.

Basically this case is an example of the difficulty inherent in the Court's attempting to construe and harmonize all the technical, overlapping and sometimes inconsistent terms of a technical contract.

Under the express decisions of the Supreme Court of the State of Arkansas and in accordance with the generally accepted principles of the American common law, the ambiguities in such a contract present a question of fact to be resolved only by the jury and not by the Court.

This Petitioner respectfully submits that the Court of Appeals for the Eighth Circuit has misapplied the applicable law of the State of Arkansas and this Petitioner asks that the Court grant Certiorari to review and correct that misapplication.

This Petitioner is at a tremendous disadvantage in its efforts to secure the Writ of Certiorari. The case was appealed, briefed and argued on the question of duress only. The Respondent, Appellant below, prepared the record in connection only with the duress question. This Petitioner, Appellee below, did not enlarge on appellant's transcript of the record to cover the ambiguity situation because the Respondent had appealed only from the duress question. Thus, without having the benefit of a complete record relating to the question of ambiguity, and without having the benefit of any citation of authority as argument, the Court of Appeals reached the decision, of tremendous consequence to this Petitioner, in a question not briefed or argued and not in this Petitioner's honest opinion, adequately presented. Petitioner is entitled to feel that he has never had a day in court to be heard on the issue on which the Court of Appeals finally decided his case.

The decision of the Court of Appeals is squarely bottomed on its ruling that the contract between Withrow and Grimshaw was not ambiguous and presented no jury question. If we are required to accept that finding, then Withrow was required to furnish the window sills all along, and Grimshaw was entitled to insist on it.

If, however, as the jury found, Withrow was never required to furnish the window sills, then the entire decision of the Court of Appeals must fall. Since Withrow was not required to furnish the sills, then Grimshaw was wrong in coercing Withrow into furnishing them. The threats of cancellation and back charging were wrongful and oppressive and designed to secure for Grimshaw a benefit to which it was not entitled. From its treatment of the window situation in its Second Contract relating to the seventh floor only, Grimshaw plainly showed that he knew that window sills were not required under Section M; so Grimshaw knew that he was not entitled to demand the window sills from Withrow.

Once we accept the jury's finding that the window sills were not included in Withrow's subcontract, then we are also entitled to go to the jury on the question of duress. The jury found that duress existed. The unquestioned facts in the case meet all the tests announced by the Court of Appeals. It is (1) a siutation where the jury found that Withrow involuntarily accepted Grimshaw's term (2) The circumstances permitted no alternative to Withrow; and (3) The circumstances were the result of coercive acts of the opposite party.

Since, as the jury found, Withrow was not obligated to furnish the window sills, then Grimshaw was not justified in coercing Withrow into furnishing them and Grimshaw should be required to pay for them.

See 12 Am. Jur. pages 502, et seq., Contracts Section 6.

The basic question in the case is the scope of the obligation that Withrow undertook by his contract to furnish the Section M items. Petitioner respectfully submits that the contract between the parties was ambiguous and that its true meaning, under the applicable decisions of the State of Arkansas, should have been submitted to the jury. The Court of Appeals erred in ignoring the plain decisions of the Supreme Court of Arkansas and in substituting its judgment for that of the jury.

CONCLUSION

This Petitioner seeks only that to which it is entitled under the laws of the State of Arkansas. Petitioner submits that the Court of Appeals has denied it those rights; and it respectfully petitions this Court to grant a Writ of Certiorari as prayed in this Petition.

Respectfully submitted

COOPFR JACOWAY

Counsel for Petitioner

APPENDIX A

I

"The court erred in overruling the demurrer to appellee's evidence and in denying appellants' motion for a direct verdict."

Page 23 of Appellants' Brief in the Court of Appeals

II

"Where there is a bona fide dispute between a general contractor and a subcontractor as to certain requirements of the contract between them, the subcontractor's deliberate offer to settle the dispute, made without fraud, accident or mistake, accepted and acted upon by the general contractor, will not be set aside for duress."

Page 23 and 24 of Appellants' Brief in the Court of Appeals

III

"Where a subcontractor, with full knowledge of all of the facts, and in order to settle a lengthly dispute as to the requirements of his subcontract, agrees to perform, and thereafter does perform in accordance with the prime contractor's interpretation of the contract, and the subcontractor accepts the benefits of such settlement, he cannot thereafter avoid his offer as having been obtained under duress."

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APPENDIX B

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 15,768

W. R. Grimshaw Company and National Surety Corporation, Appellants.

v.

Nevil C. Withrow Co., Inc., Appellee.

Appeal from the United States District Court for the Eastern District of Arkansas.

(October 21, 1957)

Remington Rogers (Paul W. Brightmire was with him on the brief) for Appellants.

Cooper Jacoway, for Appellee.

Before SANBORN, WOODROUGH and VAN OOSTERHOUT, Circuit Judges.

WOODROUGH, CIRCUIT JUDGE.

On September 12, 1951, the University of Arkansas entered into a contract with the W. R. Grimshaw Company, an Oklahoma corporation, as general contractor, to construct the University Medical Center at Little Rock, Arkansas. In compliance with the requirements of the con-

tract, the Grimshaw Company executed, as principal, a bond on which the National Surety Corporation of New York was surety.

In compiling their prime bid for the overall contract on the Medical Center, the Grimshaw Company prepared detailed cost estimates on the work they planned to perform themselves, but left specialty items, such as windows, doors, terrazzo, et cetera, to specialty companies that are familiar with them. They depend on these companies to quote a price for which the companies, under sub-bids, can furnish the necessary materials and perform the required labor. In that connection and in order to prepare a sub-bid for the aluminum windows, ornamental doors and X-ray protection, the Nevil C. Withrow Company, Inc., an Arkansas corporation specializing in aluminum windows—subcontracts and furnishing material and supplies in connection therewith, secured a set of blue prints and specifications from the architect for use in compiling their sub-bid on the Little Rock Medical Center.

On September 28, 1951, Nevil C. Withrow, president of the plaintiff company, confirmed his sub-bid to the Grimshaw Company covering "Item 1, aluminum windows, Section M-1 to M-5 for $310,000.00 and the erection thereof for $25,000.00 more, a total of $335,000.00". The bid was accepted and the amount was included in the sub-contract between the Grimshaw Company as prime and Withrow Company as sub-contractor, dated September 26, 1951.

In June of 1952, the Shop Drawings, required under the contract, showing in detail the material the window manufacturer expected to supply in connection with the sub-contract, were submitted to Grimshaw Company by Withrow. They indicated that Ware Laboratories were to do work for Withrow Company. On July 7, 1952, the Shop Drawings were returned to Withrow for correction and

resubmission. The Shop Drawings at "Section 29" were labeled "Not by Ware Laboratories." This referred to the Shop Drawings that Ware Laboratories prepared for the Withrow Company and in each case that the sills—interior and exterior—were indicated on the Shop Drawings, there was a notation "Not by Ware Laboratories nor W. C. Withrow Company." A conference with the superintendent for the Grimshaw Company and subsequent correspondence between Withrow and the Grimshaw Company during the period March through July, 1953, shows a dispute between the companies with Grimshaw contending that under the specifications, Section M-1 through M-5, Withrow was required to furnish the specified window stools and sills. Withrow maintained that Section M-1 through M-5 did not provide for the stools and sills and that he had bid on the stools and sills under Section J* of the specification, a section not awarded his company under the sub-contract.

During the correspondence that followed, over a period of 15 weeks, the Grimshaw Company insisted that unless Withrow installed the window sills and stools under the sub-contract, the work would have to be performed by someone else and back-charged to Withrow or Withrow's sub-contract cancelled in its entirety. On June 23, 1953, Withrow wrote Grimshaw that he recognized that their position was sincere and on July 2, 1953, Withrow wrote the Grimshaw Company:

> "* * * We dislike involving others in the controversy that has arisen between your Company and ours as to whether the exterior sills and interior sills (as

---

* Section J of the specifications is, in pertinent part, as follows:

Section J.

Architectural Non-Ferrous Metal

"1. Scope. The work covered by this section of the specifications consists in furnishing all labor, equipment and materials, and in performing all operations in connection with the installation of products constructed of bronze, aluminum and other non-ferrous metal, complete, in strict accordance with this section of the specifications * * * Under this heading are included aluminum hoods, canopies, sills, certain openings and frames, trim, cast aluminum ventilators * * *."

shown on the architect's plans) are included in our Company's sub-contract. It would seem impractical to do so at this time although our construction of what is covered by our sub-contract remains unchanged.

"Therefore, Nevil C. Withrow Company, Inc., is proceeding to include and furnish said exterior sills and interior sills (as shown on the architect's plans) which are in dispute and future shop drawings will be changed accordingly.

"Please delete from shop drawings in your possession note pertaining to exterior and interior sills so that resubmission will not be necessary.

Grimshaw Company acknowledged receipt of the letter containing the agreement on July 6, 1953, and wrote Withrow as follows:

"We acknowledge receipt of your letter dated July 2, 1953, wherein you state, 'Nevil C. Withrow Company, Inc., is proceeding to include and furnish said exterior sills and interior sills (as shown on the architect's plans) which are in dispute and future shop drawings will be changed accordingly.'

"Please be advised the sills referred to are to be furnished and installed in strict accordance with the specifications Section M-1 through M-5, applicable drawings, Addenda No. 1, 2, 3, and 4, and subject to the terms of the contract. The foregoing are the provisions of your contract, and under these conditions you may proceed with the execution of your contract in its entirety."

Withrow then proceeded to furnish the stools and sills and perform the necessary labor and the percentage payments made to and accepted by him under the sub-contract, as the work progressed, included allowance therefor. Withrow was paid in full, except as to the ten per cent retainage.

On February 26, 1956, the Withrow Company brought this action at law in the United States District Court for the Eastern District of Arkansas and alleged in substance that on or about October 23, 1951, Withrow Company entered into an agreement with Grimshaw Company which provided that Withrow Company should furnish certain labor and materials in connection with the cosntruction of the University of Arkansas Medical Center and that Grimshaw Company agreed to pay to Withrow Company, for said labor, material, et cetera, the sum of $335,000.00; that Withrow Company has now completely performed all its obligations under the contract; that on or about June 8, 1952, Grimshaw Company and Withrow Company entered into a further agreement in which Withrow Company agreed to furnish certain other labor, material, et cetera, in connection with the seventh floor addition to the Medical Center and Grimshaw Company agreed to pay to Withrow Company the sum of $64,589.95 for said labor, material, et cetera, and that Withrow Company has now completely performed all its obligations under said contract; that Grimshaw Company has retained the sum of $24,180.42 as retainage on the original contract and Withrow Company is entitled to that sum with 6% interest; that in connection with the original contract dated September 26, 1951, Grimshaw Company requested Withrow Company to furnish certain additional material, labor et cetera, not included in the contract dated September 26, 1951, or in the subsequent contract; that said materials were furnished by Withrow Company, as extras and in addition to either or both contracts, and Grimshaw Company received the benefit of the extras and was paid for same by the Board of Trustees of the University of Arkansas; that Grimshaw Company ordered and directed Withrow Company to furnish said extras and agreed to pay for them; that the fair and reasonable value of said extras totals $23,555.94, said amount has been due and

owing to Withrow Company since on or about December 8, 1954; that Withrow Company has repeatedly requested Grimshaw Company to pay said sum and Grimshaw Company refuses to pay. Judgment was prayed accordingly.

Grimshaw Company and National Surety Company answered, specifically denying that Grimshaw Company ever requested the Withrow Company to furnish any additional material, labor, et cetera, not included in their contracts; that the sub-contract dated September 26, 1951, did require Withrow Company to furnish the sills and stools (which were the "additional materials, labor, et cetera," referred to in plaintiff's complaint and claimed to be extras); that they had been furnished and paid for; that after a dispute had arisen as to said requirement of the sub-contract, Withrow Company had agreed to furnish the disputed items under its sub-contract and they were so furnished, not as extras.

Grimshaw Company admitted owing the $24,180.42 retainage, paid that amount into court and on January 28, 1957, the judgment as to the retainage was satisfied.

Withrow Company in reply to Grimshaw Company's answer admitted the written agreement to furnish the sills and stools and that: "the plaintiff furnished said extras at the request of the Defendant Grimshaw Company and at a time when the Defendant Grimshaw Company exercised economic duress and economic coercion over the plaintiff. Said duress and coercion were employed by the Defendant Grimshaw Company after the Plaintiff had expended and had caused to be expended large amounts of time and money in preparing to discharge and in discharging its obligation under its contract with Grimshaw Company; said duress and coercion were exercised by the Grimshaw Company's threatening, without warrant or right, to deprive Plaintiff of the benefits of its contract by

violating the contract and by threatening to attempt to cancel the contract between the Plaintiff and Defendant * * * and by threatening, without warrant or right, to have said extras furnished by someone else and to charge the cost of said extras to this Plaintiff."

The issues were tried to a jury and were decided by having the court submit to the jury three special interrogatories which were answered favorably to plaintiff. Defendant's motion for an instructed verdict made at the conclusion of the evidence and its motion for judgment notwithstanding the verdict were denied and based on the jury's answers to the interrogatories the court awarded judgment for the plaintiff in the amount of $20,000.00 together with interest and costs.

The defendants, Grimshaw Company and its bondsman, appeal.

They contend that the evidence was insufficient to support a finding of duress, business compulsion or economic coercion and that the court erred in denying their motion for instructed verdict made at the close of the evidence and in submitting the interrogatories to the jury.

The first interrogatory submitted to the jury reads as follows:

> "Interrogatory No. 1. Was the plaintiff obligated under the contract to furnish the sills in controversy?"
>
> (The jury answered, no).

The interrogatory was related to the issue framed by the allegations of the complaint to the effect that defendant requested plaintiff to furnish additional materials, not included in the sub-contract (the stools and sills) and agreed to pay for them and defendant's answer that the items were included in the original sub-contract and that

subsequent to a correspondence about it, as to the construction of the sub-contract, "there was a complete accord" and plaintiff agreed to and did furnish the items according to his sub-contract and not as extras, and in accordance with the terms thereof, plaintiff from time to time requested progress payments under the sub-contract and included the said items therein and was paid therefor.

It is contended for appellant that there was no substantial evidence to support the negative answer of the jury and that the finding was contrary to the contract's plain import.

The contract being in writing did not present any factual controversy for jury determination but solely a question as to its proper construction and its legal effect upon the parties. That question was for the court to determine. *Floyd* v. *Ring Construction Co.*, 8 Cir., 165 F.2d 125, 129; cert. denied 334 U.S. 838, 68 S.Ct. 1496, 92 L.Ed. 1763; *Pike Rapids Power Company* v. *Minneapolis, St. Paul & S. S. R. Co.*, 8 Cir., 99 F.2d 902, 916; *National Surety Corp. of New York* v. *Ellison*, 8 Cir., 88 F.2d 399, 402. We find the law of Arkansas to be in accord. See: *Linder* v. *Mid-Continent Corp.*, 221 Ark. 241, 252 S.W. (2d) 631, 632; *Paepcke Leichi Lumber Co.* v. *Talley*, 106 Ark. 400, 153 S.W. 833; *Triska* v. *Savage*, . . . Ark. . . ., 239 S.W. (2d) 1018. We hold, therefore, that it was error to submit this interrogatory to the jury as it was incumbent on the court below to construe the contract as a matter of law.

The true meaning of the contract herein involved can be arrived at through consideration of the language used, in the light of the situation of the parties under the circumstances existing at the time, together with all fair inferences to be drawn from this situation and these circumstances. Indeed, this court held in *National Pigments and Chemicals* v. *C. K. Williams & Co.*, 8 Cir., 94 F.2d

792, 795, that instruments "are not rendered ambiguous by the fact that the parties do not now agree upon the proper construction to be given them." The contract here was deliberately entered into, the language used is clear, and its meaning can easily be determined from a consideration of the simple and harmonious facts with which it deals.

The sub-contract between the parties stated, in pertinent part, as follows:

> "Whereas, Contractor desires to sub-contract to the Sub-Contractor the furnishing of all materials, tools and equipment and the performing of all work and labor necessary for the completion of the following portion or subdivision of the work to be performed in accordance with said contract and the Plans and Specifications therefor, to-wit:
>
> "For furnishing all plant, labor, equipment, appliances, and materials, and performing all operations in connection with the installation of Aluminum Windows, Aluminum Louvers, Aluminum Door Frames, in strict accordance with the specifications, Section M-1 through M-5, applicable drawings, Addenda No. 1,2,3, & 4, and subject to the terms of the contract."

The following paragraph of the sub-contract lists the items not included:

> "*Not Included*—FURNISHING AND ERECTION OF STEEL ITEMS: Angles, Shims, Bolts, Louvers, Etc., WOOD ITEMS: Inserts, Anchors, Nailers, Etc., Glass, Glazing."

Section M-1 through M-5 of the specifications as referred to in the contract are, in pertinent part, as follows:

"Section M"

Aluminum Grid, Frames, Sash, Screen and Panels.

1. *Scope.* The work covered by this section of the specifications consists of furnishing all plant, labor,

equipment, appliances, and material and in performing all operations in connection with the installation of aluminum windows, complete, in strict accordance with this section of the specifications and the applicable drawings, and subject to the terms and conditions of the Contract.

2. *General.* All metal windows, and equipment, shall be the product of a recognized manufacturer * * * The windows shall be furnished and erected complete, with insect screen * * * and with all necessary attachments, operators, hardware, and other accessories necessary and required for complete installation. * * * Each window shall be securely and permanently anchored in place to the building construction. * * * The entire installation shall be made weathertight and watertight and the Contractor and the manufacturer of windows shall assume full responsibility for this requirement * * *.

3. *Caulking and Grouting.* * * * grouting, or filling and caulking, shall be applied to all joints between frame or exterior molds and the adjacent construction in such manner as to render the equipment weathertight, wind and moisture-proof at these joints.

* * * * * * * *

5. Material * * *

(b) Interior stools where required, shall be not less than 3/23'' thick, extruded aluminum of one (1) piece without joints * * *.

Exterior sub-sills where required, shall be not less than ⅛'' thick extruded aluminum * * *.''

Nevil C. Withrow testified that he had been in the window specialty business over twenty years and that ''specifications are so familiar to me, I don't believe that I can describe them technically.'' We cannot believe that a person so experienced in the window construction specialty and dealing with window specifications under sub-contracts for the length of time Withrow has devoted to it, could,

after a careful study of the specifications and architect's drawings herein, arrive at the conclusion that the installation of the windows did not include the stools and sills, when the drawings clearly show them and the wording of the specifications plainly made it impossible to install the windows "complete * * * permanently anchored in place * * * weathertight, watertight * * * caulked and grouted * * * Interior stools where required not less than 3/32" thick, interior sub-sills where required not less than ⅛" thick * * * and contain all necessary attachments, operators, hardware and other accessories necessary and in strict accordance with the applicable drawings, Section M-1 through M-5 of the specifications," without installing the window stools and sills.

Interrogatory No. 2 submitted to the jury was as follows:

> "Interrogatory No. 2. Was the plaintiff under duress when he furnished the sills in controversy?"
>
> (The jury answered, yes).

This Court has consistently held that when the alleged facts, pleaded as constituting duress, are denied, the question of whether they existed is a question for the jury and whether those alleged facts, if they did exist, were sufficient to constitute duress, is a question of law. *Bennett* v. *Mahon,* 8 Cir., 180 F.2d 224, 227; *Furman* v. *Gulf Insurance Company,* 8 Cir., 152 F.2d 891, 894; *Winget* v. *Rockwood,* 8 Cir., 73 F.2d 78, 85; *Meyer* v. *Guardian Trust Company,* 8 Cir., 296 F.2d 789; *Dick* v. *Marx & Rawolle,* D. C. Cir., 4 F.2d 879; Cf., *Bene* v. *New York Life Insurance Co.,* 87 S.W. (2d) 979, 191 Ark. 714.

We find the same rule applied by the Supreme Court of Arkansas in *National Life & Accident Insurance Company* v. *Blanton,* 192 Ark. 1165, 97 S.W. (2d) 77, 79-80, wherein that court considered the question of duress in the method

of procuring a signed release and the testimony was in irreconcilable conflict. The court held since the jury found that the facts, alleged to constitute the duress, did exist, "these facts were sufficient to constitute duress."

The facts in the present case alleged to constitute duress and economic coercion are not in dispute and whether such facts, as they existed, were sufficient to constitute duress was a question of law and the court was in error in submitting the second interrogatory to the jury. The evidence introduced to show Grimshaw's threats is contained in the correspondence between the parties at the time of the dispute and may be summarized as follows:

1. By letter of April 20, 1953, Grimshaw stated:

> "Unless we have the desired cooperation from you, it will be necessary for us to have this work accomplished by someone else and the final cost of materials and installation will be charged to your contract."

2. By letter of April 29, 1953, in which Grimshaw said:

> "In view of the * * * facts, our position has not changed and we again request the required subsills be furnished and installed in accordance with your proposals and subsequent contract. In the event you decide on the contrary you leave us no other alternative except to purchase this material elsewhere, have it installed and charged to your contract."

3. On June 11, 1953, when Withrow's shop drawings still indicated he did not intend to furnish the subsills or interior stools and Withrow had suggested a court action to construe the contract, Grimshaw wrote Withrow:

> "We see no point in going to court at this time in view of the fact you have made no installation nor furnished any materials under the existing

contract, and we would prefer to cancel the contract completely rather than invite court action as a result of an apparent misunderstanding at this time. If agreeable to all concerned, we prefer to handle this problem in that manner.

"On the other hand, if you insist on furnishing only a part of the materials under your contract with us, we will be forced to contract elsewhere for the items you do not furnish and charge the cost, plus the installation, to your contract. In this event it will be your privilege to file suit in an effort to recover such back charges when they have actually occurred.

"On the basis of your letter, dated June 8, we are proceeding with our effort to purchase elsewhere the materials in question and will arrange for the installation. Since there is no time to be lost and we would like an expression from you immediately whether or not you prefer to go on with your contract in its entirety or if you desire that we shall cancel out. If you elect to furnish all the materials except the subsills and stools, these will be purchased and installed by us and charged back to your contract in accordance with our letter of April 29."

4. And finally on July 1, 1953, Grimshaw wrote:

"In connection with your letter of June 23, regarding the items of exterior sills and interior subsills, we cannot entertain a proposal from you covering these items which represents an addition to your contract. Our position in this regard has been clearly stated, and is of record in your files. We are proceeding with the purchase of these items, and unless we have advice from you within five days that you will comply with all provisions of your contract which includes the exterior subsills and interior sills, we will be forced to cancel your contract in its entirety."

On July 2, 1953, Nevil C. Withrow wrote the Grimshaw Company, stating:

> "Nevil C. Withrow Company, Inc., is proceeding to include and furnish said exterior sills and interior sills (as shown on the architect's plan) which are in dispute and future shop drawings will be changed accordingly.
>
> Please delete from shop drawings in your possession note pertaining to exterior and interior sills so that resubmission will not be necessary."

In connection with the foregoing correspondence, Withrow testified on the trial: "My company is not a large company * * * gross annual profit is probably $18,000 or $20,000. It varies, of course, but on an average we have somewhere around $35,000 possibly to $60,000 gross. If this contract had been cancelled out I stood to lose the entire business. I mean go broke. The cancellation confronted me with brankruptcy * * * if the cancellation went through it meant the collapse of everything I built up * * * I felt that in furnishing them (the stools and sills) we would further the progress * * * I thought that after we got things all down the line and worked out they would pay for them. If they owed for them I expected pay for them * * *."

Under the evidence here the only acts threatened by Grimshaw Company were those provided by the contract as remedies in case of default. No unlawful acts were threatened by Grimshaw and Withrow testified: "There were three possibilities under the correspondence * * * I could proceed to furnish the material under the contract and not charge him anything for it as in his letter of July 6, or I could say I won't do any of it and he would cancel the contract, or I could furnish everything under the contract except the aluminum sills and he would buy the material elsewhere and backcharge it * * * At that time, and

except for my own business necessities, theoretically, I had a choice of any one of these possibilities * * * I elected to take the choice to furnish the material, not charge him with anything for extras, and hope that when the whole job was over, under negotiation I would then get some compensation for it."

An examination of the cases in the field of duress and economic coercion makes it clear that three elements are common to all situations where actionable duress has been determined to exist: (1) that one side involuntarily accepted the terms of another; (2) that circumstances permitted no other alternative; and (3) that said circumstances were the result of coercive acts of the opposite party. *United States* v. *Bethlehem Steel,* 315 U.S. 289, 301, and Cf., *Furman* v. *Gulf Insurance Company,* 8 Cir., *supra*; *Bennett* v. *Mahon,* 8 Cir., *supra; Winget* v. *Rockwood,* 8 Cir., *supra.*

In order to substantiate the allegation of economic duress or business compulsion, the plaintiff must go beyond the mere showing of a reluctance to accept and of financial embarrassment. There must be a showing of acts on the part of the defendant which produced these two factors. The assertion of duress must be proven by evidence that the duress resulted from defendant's wrongful and oppressive conduct and not by plaintiff's necessities.

In reviewing the testimony presented as evidence of the alleged duress herein, we do not find wrongful conduct on the part of Grimshaw nor that Grimshaw's statements that he would resort to his legal remedies under the contract deprived Withrow of the exercise of his free will or volition. Withrow, by his own testimony, voluntarily agreed to proceed and furnish the windows, when as he testified,

he had three alternatives including a complete and adequate remedy at law if Grimshaw was wrong about the contract. Withrow, however, chose to furnish the sills under the contract and not as extras, and so stated in his letter of July 2, 1952. Grimshaw gave his written acceptance of this offer on July 6, 1955, and this agreement to furnish the sills under the contract and not as extras constitutes a bar to the relief demanded by plaintiff.

Withrow contended that the Ware Laboratories might impose a cancellation charge if Grimshaw cancelled the contract, and that because of his financial condition, this might bankrupt him. But the contention seems to be without merit, in that the alleged danger of a cancellation charge by a third party cannot be made the basis of a claim of duress between contracting parties. Further, in the record of this case we find no evidence that Ware Laboratories threatened a cancellation charge or that Grimshaw had anything to do with plaintiff's financial condition and whatever may have been Withrow's financial need, no threats by Grimshaw to cancel the contract produced this condition. Nothing in this record suggests that the defendant did not act in good faith nor does the evidence show that Grimshaw took advantage of Withrow's financial condition, or in fact, that he had any knowledge of it. In these circumstances, Withrow's own financial condition, for which Grimshaw was in no way responsible, could not be made the basis of a claim of duress. *Sillman* v. *U.S.*, 101 U.S. 465, 471; *Lawrence* v. *Muter Company*, 7 Cir., 171 F.2d 380, 382.

On consideration of the whole record, our conclusion is that no facts were present, sufficient, to support a finding of duress practiced upon Withrow in the making of his agreement to furnish the sills under his contract, and not

as extras, and that his agreement made subsequently to the original sub-contract considered with his request for and receipt of payment for the items under the contract, constitutes a complete bar to the relief demanded by him.

The motion for directed verdict should have been sustained. The judgment appealed from is reversed and the cause is remanded with directions to enter judgment for defendant.

Reversed and remanded.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

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IN THE SUPREME COURT OF THE UNITED STATES,
October Term, 1957

NO. 743

NEVIL C. WITHROW COMPANY, *Petitioner*
v.
W. R. GRIMSHAW COMPANY and NATIONAL SURETY COMPANY, *Respondents*

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

JURISDICTION

In compliance wth rule 23(g), it may be stated that jurisdiction in the court of first instance resulted from diversity of citizenship with the amount in controversy in excess of $3,000.00.

Statement

September 12, 1951, respondent, W. R. Grimshaw Company, herein called Grimshaw, became the general contractor for construction of a six story medical center in Little Rock, Arkansas (plaintiff's Exhibit 16, R. 113). Respondent, National Surety Company, was surety upon its bond.

September 26, 1951, Grimshaw gave a written sub-contract to the petitioner, Nevil C. Withrow Company, herein called Withrow, for all equipment, labor, material, etc.

for performance of that part of the principal contract described in specifications M-1 through M-5 (plaintiff's Exhibit B. R. 9). For brevity this will be referred to as the original September contract.

April 8, 1952 the owners gave Grimshaw a change order directing Grimshaw to "construct in part a seventh floor" addition to the Medical Center (plaintiff's Exhibit 17 R. 129).

June 8, 1952 Grimshaw gave Withrow a written subcontract for performance of the work described in specifications M-1 through M-5 as to the seventh floor (plaintiff's Exhibit C, R. 13). This will be referred to as the 7th floor contract.

From March 18, 1953 to July 6, 1953 there was a vigorous dispute and interchange of correspondence between the parties (R. 48 to 66). Withrow contended that Sections M-1 to M-5 of the prime contract, being the work subcontracted to Withrow, did not require Withrow to furnish or install the window *sills* for the countless aluminum windows required in Section M. With equal vigor Grimshaw insisted that the sub-contract did require Withrow to furnish and install the sills. The dispute was settled by Withrow's letter of July 2, 1953 (R. 64) and Grimshaw's acceptance thereof on July 6, 1953 (R. 65), in which Withrow agreed to furnish the exterior and interior window sills which had been in dispute, and Grimshaw authorized Withrow "under these conditions" to proceed with the execution of Withrow's contract. For brevity we shall call this the July agreement. It was reached before Withrow had done any construction on the site.

Without any further claim that the sills were not included in his sub-contract, Withrow then performed. In accordance with the July agreement he duly installed the windows, including the window sills where required by the "applicable drawings." He submitted his monthly estimates (R. 91 to 105) which, less the agreed retention, were duly paid (R. 106).

Withrow made no further claim for the window sills as a separate item until after the completion of the building in August, 1955. Then for the first time since the July agreement Withrow claimed he should be paid extra for "furnishing and installing exterior sills and interior sills" (plaintiff's Exhibit 14 R. 71), and refused to accept the retention fund in full settlement (R. 159). Withrow sued (Complaint R. 1 and amendment R. 17) for the retention fund and for furnishing window sills as extras. (The retention fund has since been paid and is not involved at this time. R. 28). Grimshaw pleaded (R. 18 and Amendment R. 22) that the original September sub-contract required Withrow to furnish the sills, and additionally pleaded the July agreement in bar to any recovery under the September contract; that the July agreement was a waiver, and an estoppel had resulted through the performance under the July agreement. Withrow filed a reply (R. 24) alleging the July agreement had been obtained through duress.

From an adverse verdict (R. 26) and judgment thereon (R. 27) the defendants appealed to the Court of Appeals for the Eighth Circuit (R. 175). Oral argument was had

(September 6, 1957) before appellants' time to file reply brief had expired. During the argument the Court of Appeals allowed appellants 10 days time for filing reply brief and gave Withrow the right to file answer thereto "if new questions are raised in the reply brief" (Appendix A, No. 1). Withrow did not file any answer or supplemental brief. The Court of Appeals thereafter held that the motion of the orginal defendants for directed verdict should have been sustained and reversed the judgment (248 F. 2d 896. Opinion, Appendix B to petition for certiorari).

Withrow thereupon filed petition for rehearing which the Court of Appeals denied November 15, 1957 (Appendix 2).

ARGUMENT

Summary. The petition for certiorari should be denied.

First. Because the question presented is on an alleged error of law of private concern only and is not within the purview of Rule 19.

Second. Because the question presented is moot. The Court of Appeals considered two independent grounds and decided both adversely to the petitioner. Only one of these issues is attacked in the petition for certiorari. If the entire part of the decision below pertaining to the issues complained of should be regarded as erroneous or as obiter dictum, the decision below would still stand because of the findings and conclusions of the Court of Appeals on the other issue.

Third. Because there is no ambiguity in the contract itself and no ambiguity is shown through extraneous matters such as the 7th floor contract. All questions of ambiguities, latent, patent and extraneous, were orally argued and petitioner was given and waived, the right to file a supplemental brief on the very matters complained of to this Court.

I. The question presented is not within the purview of Rule 19 of this Court.

A. ALLEGED BASIS FOR CERTIORARI. No question of public concern appears in the pending petition. To bring the matter within the purview of Rule 19, petitioner asserts as his sole ground that the decision of the Court of Appeals conflicts with decisions of the Arkansas Supreme Court.[1] Petitioner's complaint might be stated as follows:

1. The original contract between the parties was ambiguous because it employed the word "sill."[2]

No Arkansas decision is cited in support of this contention. Petitioner submits the point on argument alone.

2. Under Arkansas law, where a contract is ambiguous its interpretation must be left to the jury.[3]

3. Therefore, the Court of Appeals' finding that the contract was not ambiguous conflicts with Arkansas law.

The mere statement of this syllogism shows that the conclusion does not follow from the premises.

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1. "This petitioner seeks to come to this Court for the reason that the contract between the parties was ambiguous under the decisions of the Supreme Court of Arkansas. The Court of appeals has reached a result in square conflict with decisions of the Arkansas Supreme Court; * * *."
(Petition page 6).

2. "* * * it is necessarily an ambiguous term; and it made the contract ambiguous when or where it was employed." (See Petition page 10)

3. Authorities cited, Petition pages 10, 11 and 12.

B. THE FINDING OF THE COURT OF APPEALS THAT THE CONTRACT WAS NOT AMBIGUOUS DOES NOT CONFLICT WITH ANY ARKANSAS LAW OR DECISION.

1. *General Rule.* All agree that where a written contract is free from ambiguity, the construction and legal effect present a question of law for the Court. But, before any jury question can arise some agency must first determine whether or not there is an ambiguity in the contract. Who can make this determination?

2. *Whether a contract is ambiguous or not is a question of law for the court.* The rule stated in 17 C. J. S. 1287, Contracts, Section 617, seems to be universal that

> "The question of whether an ambiguity exists is to be determined by the court as a question of law."

The Arkansas courts uniformly follow this rule.

Yale Automobile Co. v. *Walker,* 145 Ark. 344, 224 S. W. 632; *Lindner* v. *Mid-Continent Petroleum Corp.,* 221 Ark. 241, 252 S. W. 2d 631.

It follows that the Court of Appeals was proceeding strictly in accordance with Arkansas law, when it made the determination of whether the contract was, or was not, ambiguous.

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4. "Petitioner does not question * * * that a contract, when free from ambiguity, presents no jury question." (Petition page 7)

3. *The Court of Appeals found the contract was not ambiguous.* The Court of Appeals made the necessary preliminary determinaton. It found that the original September contract was not ambiguous.[5]

4. *The suggested conflict with Arkansas law is not shown by the record.* Petitioner presents a plethora of citations (Petition pages 10 to 12) to establish that a jury question arises *when* the court has made the preliminary finding that the contract *is* ambiguous. He cites no Arkansas decision holding that this particular contract is ambiguous. Page after page is devoted to support petitioner's view that the original September contract contained an ambiguity. This is submitted solely on the basis of his argument, and not with reference to any Arkansas law. If there were an ambiguity in the contract, then the finding of the Court of Appeals to the contrary would have been erroneous. In no event would it conflict with any Arkansas rule of law or decision of the Arkansas Supreme Court.

C. CONCLUSION. Under Arkansas law, whether a written contract is ambiguous is a preliminary question to be decided by the court; unless an ambiguity is found, the construction of the contract is a matter of law for the court. The Court of Appeals found there was no ambiguity in the original September contract. Petitioner disagrees only with this finding. He does not dispute that the court was

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5. **Opinion below 248 F. 2d 896 Loc. Cit. from page 31 of Appendix to Petition for Certiorari**
"The contract here was deliberately entered into, the language used is clear and its meaning can easily be determined from a consideration of the simple and harmonious facts with which it deals."

the proper agency to make the finding. He does not contend that the finding so made conflicts with any decision of any Arkansas court. Whether that finding is right or wrong affects only the parties to this action. It is a matter of purely private concern. No fact or circumstance within the purview of Rule 19 is presented. We have no conflict with any state law.

II. The question presented for certiorari is moot.

A. THE QUESTION PRESENTED. Petitioner presents only the question whether the Court of Appeals was correct in holding that the contract between the parties was unambigiuous.[6]

B. STATEMENT OF THE ISSUES.

1. *Petitioner's Contention.* Petitioner contends (Petition 20) that

> "The basic question in the case is the scope of the obligation that Withrow undertook by his contract to furnish the Section M items."

It is additionally asserted (Petition 19) that if Withrow was not required to furnish the window sills under the original September contract

> "* * * * then the entire decision of the Court of Appeals must fall."

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6. **Question submitted. (Petition page 2)**
"Was the Court of Appeals for the Eighth Circuit correct in declaring that the contract between the parties contained no ambiguous terms and presented no question of fact?"

2. *Respondents' Contention.* The Court of Appeals discussed two independent issues. It found and held:

(a) The original September contract was not ambiguous and required Withrow to furnish the sills.

(b) The subsequent July agreement was not void for duress and constituted a complete bar to any recovery under the original September contract.

Respondents therefore contend that, if the July agreement was a complete bar to any recovery under the original September contract, then the scope of Withrow's obligations under the original September contract, is of academic interest only; whether it was or was not, ambiguous; whether it did, or did not require Withrow to furnish the sills, is quite immaterial. The judgment of the Court of Appeals would not be affected by any ruling on the question submitted.

C. THE TRIAL ISSUES.

1. *The Pleadings.* The action was to recover for window sills as extras to a written contract. Answer: Sills were not extras, but whether they were or were not extras under the original September contract, the parties had already settled that dispute by an unambiguous July agreement that Withrow would furnish the sills under the contract and not as extras. Reply: July agreement was obtained through duress.

2. *Sequence of Determination of Issues.* From a chronological viewpoint, one might defer consideration of the July agreement until after determining whether the

original September contract required Withrow to install the sills. On the basis of logic and legal reasoning, however, it would seem preferable first to consider whether Withrow is barred by the July agreement. If so, we would never get to consider the original September contract at all. Under old time practice, a plaintiff, confronted with such a plea in bar, would perhaps have been obliged first to sue in equity to set aside the July agreement, before a court of law would even permit him to maintain an action on the original September agreement. For practical purposes, unless the July agreement is set aside for duress, the dispute about the original September contract would seem to be pointless. We shall, therefore, first discuss Withrow's attempt to avoid the July settlement.

3. *The Duress Issue.* The only ground on which Withrow attempted to avoid the July agreement, was that this agreement was obtained through economic coercion and duress. The only threats complained of were in writing in the correspondence between the parties (R. pages 48 to 66 inclusive). The only suggestion that these threats resulted in coercion was the undisputed testimony of Mr. Withrow, the petitioner's president. Where the facts are undisputed and uncontradicted, whether such threats are sufficient to constitute duress, is a question of law for the court. *Winget* v. *Rockwood,* 5th Circuit, 69 F. 2d 326, 330, *Bennett* v. *Mahon,* 8th Circuit, 180 F. 2d 224, 227.

D. THE JULY AGREEMENT ELIMINATES ANY NECESSITY FOR CONSIDERING ALLEGED AMBIGUITIES IN ORIGINAL SEPTEMBER CONTRACT.

1. *Determination of the Duress Issue.* After a clear and elaborate analysis of both facts and law the Court of Appeals concluded its findings on the subject of duress in the following language: (emphasis supplied)

> "On consideration of the whole record, our conclusion is that no facts were present, sufficient to support a finding of duress practiced upon Withrow in the making of his agreement to furnish the sills under his contract, and not as extras, and that his agreement made subsequently to the original sub-contract considered with his request for and receipt of payment for the items under the contract, *constitutes a complete bar to the relief demanded by him.*" (Opinion 248 F. 2d 896, quoted from pp. 38-9, petition for *certiorari*.)

2. *Consequences of Determination of Duress Issue.* If, as the Court of Appeals held, the July agreement, with performance and payment thereunder, constitutes a complete bar to recovery for the window sills, of what significance is the question whether the original September contract was ambiguous or not? If it was ambiguous, there was a lengthy dispute between the parties and in the correspondence above mentioned, each set forth his own views. Without fraud, mistake or duress, that dispute was settled by a new, clear and unambiguous agreement under which Withrow was allowed to proceed. No question is submitted to this Court concerning the duress issue, and yet, the determination of that issue, whether right or wrong, settled the whole case. The July agreement, not being void for

duress, constituted a bar to any recovery. True, the Court of Appeals carefully and painstakingly considered and quoted the original sub-contract. It convincingly demonstrated that from the very first Withrow had been obligated to install the window sills, and that there was nothing ambiguous about the original September contract whereby Withrow undertook this obligation. If this part of the opinion—if the entire discussion of the Court of Appeals concerning the terms of the original September contract—should be treated as *obiter dictum*, it would not follow that the judgment of the Court of Appeals should be reversed. Withrow was still barred by the July agreement regardless of any ambiguities in the original contract. When the determination of the only question submitted for *certiorari* would be without legal significance or effect, the question will be deemed moot and *certiorari* denied.

III. The Original September Contract was not Ambiguous and it did Require Withrow to Install the Window Sills.

A. SCOPE AND PURPOSE. We believe we have already demonstrated that the consideration of this proposition is academic only. Regardless of the technical insufficiency of the petition for *certiorari* in submitting only a question without legal consequence, we propose to answer petitioner's contentions on the merits. Without benefit of any separate or specific statement by petitioner we can, we believe, summarize all of his contentions under three principal points, as follows:

PETITIONER'S CONTENTIONS

1. The original contract was ambiguous because of the use of the word "sill."

2. The Seventh Floor contract shows the parties construed the original September contract as not including window sills.

3. The Court of Appeals decided the case on a point not briefed or argued.

We shall answer these contentions in the order stated.

B. THERE WAS NO AMBIGUITY, LATENT OR PATENT IN THE ORIGINAL SEPTEMBER CONTRACT.

1. *Reference.* This answers the arguments on pages 7 to 12 and 17 to 18 of the petition for *certiorari*.

2. *The Terms of the Original September Contract.* Withrow agreed (R. 9, 10) to furnish all materials, tools, equipment and labor and perform all operations

> "• • • in connection with the installation of aluminum windows • • • in strict accordance with specifications Section M-1 through M-5 and applicable drawings • • •."[7]

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7. Original sub-contract (R. 9 and 11) reads in part:
"That the Sub-contractor will furnish all materials, tools, equipment and labor necessary to fully perform all of the above set forth portion or subdivision of the contract between the Owner and the Contractor in accordance with the Plans and Specifications pertaining to the above portion or subdivision of the work to be done."

The "above portion or subdivision" of the work is described as follows:
"For furnishing all plant, labor, equipment, appliances and materials, and performing all operations in connection with the installation of Aluminum Windows, Aluminum Screens, Aluminum Panels, Aluminum Louvres, Aluminum Door Frames, in strict accordance with the specifications, Section M-1 thru M-5, applicable drawings, Addenda No. 1, 2, 3 and 4, and subject to the terms of the contract."

3. *Specifications Sections M-1 through M-5.* For the convenience of the Court we quote from Specifications Section M-1 through M-5 (R. 33 to 38 inclusive) in skeleton form. The emphasis is ours:

"1. *Scope.* The work covered by this section of the specifications consists of furnishing *all* plant, labor, equipment, appliances *and materials, and in performing all operations in connection with the installation of aluminum windows, complete,* in strict accordance with this section of the specifications and the applicable drawings, and subject to the terms and conditions of the contract."

"2. *General.* All metal windows and equipment shall be * * * of the designed types indicated on the drawings * * * the windows shall be *furnished and erected complete* * * * with all necessary attachments * * * neessary and required for complete installation * * * each window shall be securely and permanently anchored in place to the building construction * * * *the entire installation shall be made weather tight and water tight,* and the contractor and manufacturer of windows shall assume *full responsibility for this requirement.*"

* * * * * * * *

5. *Material.* (a) windows, vents, window frames, screen frames, sills, stools * * * shall be extruded aluminum * * *.

"Interior stools where required, shall be not less than 3/32" thick, extruded aluminum of one (1) piece without joints. Maximum length required is 27'-1".

"Exterior subsills where required, shall be not less than 1/8" thick extruded aluminum. Lengths shall be of the longest practical sections with butt flush fastening from below."

4. *The Applicable Drawings.* There was no dispute that defendant's Exhibit No. 1 (R. 81) was the applicable drawing. It bears the title "window details." Immediately below the encircled figure 9 the Court will find the applicable drawing for the exterior aluminum sill and immediately to the left thereof the interior sill together with the anchor clip. This was used by the plaintiff in his shop drawings (plaintiff's Exhibit 22, R. 153). In the lower left hand corner the Court will find the original applicable drawing reproduced together with the notations by Withrow that the sills therein shown would not be furnished by him.

5. *Alleged Ambiguity.* The only ambiguity alleged to be in the contract itself is that assumed to result from the use of the word "sill" which is said to be a word of ambiguous meaning.

6. *Conclusion as to Contract.* Regardless of alleged distinctions between a "window sill" and the "sill of a window," it would seem clear that there is no ambiguity in the contract to perform all operations required under Section M.

Withrow undertook to perform all of these operations "in connection with the *installation* of the windows, *complete* • • •". He expressly agreed that each window would be permanently anchored in place (Section 2) and that the installation would be weather tight and water tight. It is admitted that the exterior and interior sills were shown on the applicable drawings. It could hardly be contended that a window *installation* is "complete" without window sills. In no event would the installation be

weather tight and water tight without the window sills, and finally, by what reasoning could one explain the specifications of the particular material, of a specified kind and thickness, for the particular interior and exterior window sills, as required by paragraph 5 of Section M, unless Section M did require the installation of such window sills? In the face of such clear, definite and conclusive specifications, no claim that an ambiguity resulted from some strained meaning of the word "sills" is very impressive.

C. THERE WAS NO AMBIGUITY FROM EXTRANEOUS MATTERS. In these circumstances we can understand why petitioner has not relied very heavily on the fragile contention that there was anything ambiguous in his subcontract to furnish and do everything required by the specifications of Section M. On the contrary, petitioner attempts largely to inject ambiguity into his contract by extraneous circumstances. He introduced Section J of the contract, which is not involved in his subcontract at all, and chief among the extraneous circumstances is his argument based on the 7th floor contract, which we will now consider.

D. THE 7TH FLOOR CONTRACT.

1. *Reference—Petition for Certiorari, Pages* 12 *to* 15.

2. *Respondents' Contention.* Both the original September contract (R. 9) and the 7th floor contract (R. 13) required Withrow to install the windows "complete," in accordance with Specifications M-1 to M-5 and the *applicable drawings.* As to the original September contract we have already seen that the applicable drawings showed the

sills in controversy. As to the 7th Floor contract, it is to be noted that under the change order Grimshaw was required only "to construct in part a seventh floor" (plaintiff's Exhibit 17, R. 129); this was to be only the "shell" of a building (R. 132); and the architect testified without contradiction (R. 132-133)

> "• • • under Section M-1 there was no requirement that interior sills would be furnished on the 7th floor *because there would be no applicable drawing.*" (Emphasis supplied.)

3. *Conclusion as to 7th floor argument.* We therefore agree with petitioner that Grimshaw demanded (Petition 14)

> "that Winthrow furnish more under the first contract than • • • was due under the second contract."

Both sections required the installation of the windows in accordance with the applicable drawings. The applicable drawings for the first contract required installation of the window sills. There were no applicable drawings showing window sills under the 7th floor contract. It is difficult to comprehend in what respect *either* contract was at all ambiguous in this respect, or to find any inconsistency in Grimshaw's demands under the separate contracts.

E. PETITIONER WAS NOT DENIED HIS DAY IN COURT.

1. *Reference.* This answers pages 5 and 6 and the last paragraph on page 18 in the petition for *certiorari*, all to the effect that in considering the original September contract, the Court of Appeals decided the case on an issue not briefed or argued; that the record is inadequate on this *point, and that petitioner* has never had a day in court to be heard on this issue.

2. *Nature of Proof.* Obviously these contentions are not to be answered by reference to the record of the case used by the Court of Appeals. Whether the question was briefed and argued can appear only by reference to the briefs of the parties and to orders made by the Court of Appeals during the course of the oral argument. We have therefore added as Appendices 3 to 11 quotations from the briefs of the parties under which the case was submitted to the Court of Appeals, together with copies of the orders of that Court, and quotations from the petition for rehearing in the court below.

3. *The Question Whether the Original September Contract was Ambiguous was Briefed and Orally Argued.* As suggested above, the obligations of the original September contract were without significance at the time when Withrow first commenced the installation of the windows. By the July agreement he had specifically undertaken to install the window sills. So long as that agreement remained, it constituted a complete bar to any controversy about the obligations of the original September contract. In answer to Grimshaw's brief to the effect that the July agreement rendered unnecessary any discussion of the original September contract, and that the July agreement was not void for duress, Withrow injected the contention that the original September contract did not require him to furnish the window sills. The argument that the word "sill" is of ambiguous meaning was duly presented (Appendix 3). The predicate for the 7th floor argument was

originally made on pages 5 to 6 of Withrow's brief (Appendix 4). The same 7th floor argument was made (Appendix 5) and it was fully developed on pages 16 to 18 of his brief (Appendix 6) and even the conclusion contained the argument that Withrow was under no obligation to furnish the sills (Appendix 7).

Much of the foregoing argument was presented as showing that Grimshaw could not have been in good faith in the dispute over the meaning of the contract. In answer to this attack upon his good faith, Grimshaw, in his reply brief, pointed out that the requirements of the original September contract had no legal significance (Appendix 8), but nevertheless Grimshaw presented, in detail the exact and actual contract obligations of the parties under the original September contract, and also answered all of the extraneous circumstances suggested by Withrow in his attempt to show that the contract was ambiguous.

4. *Court of Appeals' Orders.* Oral argument had been set in this case before the time had expired within which Grimshaw was allowed to file a reply brief. At the oral argument the Court of Appeals enlarged the time within which Grimshaw could have the reply brief printed and filed. Court and counsel for both sides all agreed that to conduct the oral argument before Grimshaw's reply brief was filed could possibly operate to the prejudice of Withrow in depriving him of the opportunity, in the oral argument, to answer everything in the reply brief. To preclude any possible claim of prejudice, the Court duly entered its order giving Withrow leave to answer "if new questions are raised in the reply brief." (Appendix 1.)

5. *Proceedings after Oral Argument.* Grimshaw and his surety duly filed their reply brief. As in the oral argument, the reply brief duly considered Withrow's obligation under the original September contract. Withrow made no complaint, filed no application to supplement the record on which the case was submitted, and filed no supplemental brief of any kind. In due time the Court of Appeals rendered its judgment and shortly thereafter Withrow filed his petition for rehearing. In that petition for rehearing Withrow made the identical contention now submitted to this Court, that Withrow had

> "not been given an opportunity to be heard on the issue which this court has now made the basis for its decision." (Appendix 9.)

Again contention was made that the word "sill" is ambiguous (Appendix 10) and the 7th floor argument was again made (Appendix 11) in language almost verbatim with that employed in this Court.

6. *Conclusion.* Petitioner himself injected the issue of the meaning of the original September contract in his answer brief. The matter was completely argued in the oral argument before the Court of Appeals. Indeed counsel may well remember that his major point was there christened "the seventh floor argument." The reply brief presented the issue in detail. Ample opportunity was allowed to petitioner to supplement the record and to file a supplemental brief before the Court of Appeals in event he was so advised. With his memory thus refreshed, counsel may perhaps recall there was nothing in the Grimshaw reply brief that had not been included in the oral argu-

ment, and there is nothing in the opinion of the Court of Appeals that was not fully presented both in the oral arguments and in the reply brief. The precise point was submitted to the Court of Appeals in the petition for rehearing. In these circumstances we are unable to concur with counsel in his contention that the part of the decision holding that the contract was not ambiguous, was not adequately briefed, or was not submitted to the Court of Appeals for its decision. Having the opportunity to supplement the record and the right to file a supplemental brief to controvert Grimshaw's reply brief, and having declined to take advantage of this right, Withrow clearly waived any right to contend, at *this* time, that he was denied any opportunity to be heard on the issue of the meaning of the original September contract.

CONCLUSION

The question presented is not within the purview of Rule 19 and is moot. There was no ambiguity in the contract nor was petitioner denied his day in court. If petitioner felt that the ambiguity issue was not adequately argued or presented, he had express leave to file a supplemental answer brief, and waived this right.

For the foregoing reasons the petition for writ of *certiorari* should be denied.

Respectfully submitted,

REMINGTON ROGERS,
409 Oil Capital Building,
Tulsa 3, Oklahoma,
Attorney for Respondents.

APPENDIX.

Appendix No. 1.

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

September Term, 1956.

Friday, September 6, 1957.

Appeal from the United States District Court for the Eastern District of Arkansas.

No. 15,768.

W. R. GRIMSHAW COMPANY, et al., Appellants,

vs.

NEVIL C. WITHROW CO., Inc.

This cause having been called for hearing in its regular order, argument was commenced by Mr. Remington Rogers for appellants, continued by Mr. Cooper Jacoway for appellee, and concluded by Mr. Remington Rogers for appellants.

Thereupon, this cause was submitted to the Court on the printed record and briefs of counsel filed herein, with leave to appellants to file Reply Brief within ten days and to counsel for appellee to file answer thereto if new questions are raised in the reply brief.

Appendix No. 2.

United States Court of Appeals
for the Eighth Circuit.

E. E. Koch, Clerk. St. Louis, Missouri,
November 15, 1957.

15768. W. R. Grimshaw Co., et al., v. Nevil C. Withrow Company, Inc.

Messrs. Rogers & Brightmire,
409 Oil Capital Bldg., Tulsa, Oklahoma.

Dear Sirs: An Order of this Court has today been entered denying the petition of the appellee for a rehearing in the above case.

Very truly yours,
Eugene C. Fisher, Acting Clerk.

cc:Mr. A. L. Barber,
Little Rock, Arkansas.

Appendix No. 3.

"The sill of a window is a technical term. It refers generally to the top or bottom member of a window. The narrow shelflike surface found at the bottom of the window opening and projecting into the room at right angles to the window opening and covering the material in which the window opening is made, is what laymen call a window sill; but in the building trades it is called a stool or apron when it is on the inside of a room and a subsill when it is on the outside of the window opening. It is especially important to remember in this case the difference in meanings of the term sill when in connection with windows." (Withrow brief, pages 4-5.)

Appendix No. 4.

"Grimshaw then entered into a supplementary contract with the Withrow Company whereby • • • Withrow agreed to furnish for the seventh floor exactly what he had agreed to furnish for the rest of the building (R. 13-15)." (Withrow brief, pages 5-6.)

Appendix No. 5.

"It is most significant to know that the second contract between the University of Arkansas and the Grimshaw Company relating to the seventh floor required the Grimshaw Company to furnish the windows and meet the requirements of Section M, but that contract did not require the Grimshaw Company to furnish the items covered in Section J and Grimshaw did not furnish the window sills for seventh floor. In connecton with the seventh floor, Withrow furnished only the windows, as required by Section M and did not furnish the window sills, although the Grimshaw Company had compelled Withrow to furnish the window sills claiming they were a part of Section M in connection with the other six floors." (Withrow's brief, page 9.)

Appendix No. 6.

"Briefly: Under the first contract between the Grimshaw Company and the Board of Trustees, the Grimshaw Company undertook to construct a six-story Medical Center and to furnish in connection with it items described in Sections M and J of the Specifications. Later the Grimshaw Company was given a separate contract in which it undertook

to construct a seventh floor to the Medical Center building and undertook to furnish in connection with that seventh floor only those items described in Section M. It subcontracted with Withrow as to all seven floors that Withrow should furnish only the Section M items. When Grimshaw completed the seventh floor, it did not furnish window sills. The Grimshaw Company, in failing to furnish window sills for the seventh floor, necessarily recognized that window sills were not included in the requirements under Section M." (Withrow brief, pages 17-18.)

Appendix No. 7.

"Grimshaw wrongfully demanded that Withrow furnish the window sills when in truth and in fact Withrow was not under obligation to furnish those sills." (Withrow brief, page 33.)

Appendix No. 8.

"a. *Preliminary Statement.* In our original brief, we devoted no time to prove that the original subcontracts required Withrow to furnish the sills. It was then, and is now, our position that since *the sills were furnished by Withrow, in accordance with his letter of July 2, 1953, and Grimshaw's acceptance thereof,* it was quite unnecessary to consider whether the *original* subcontract did or did not include the sills. Since the good faith and sincerity of Grimshaw is attacked on this ground, it now becomes necessary to inquire whether, under the subcontracts *as written,* Mr. Grimshaw was justified in the position taken." (Reply brief, pages 4-5.)

This was followed by appropriate arguments under subheads

"b. *Withrow's duty under Section M"* (Reply brief, page 5).

"c. *The applicable drawings required Withrow to install the Window Sills"* (Reply Brief, page 6).

"3. *Neither Section J, nor Withrow's separate bid thereon eliminated the sills from Withrow's contract."* (Reply Brief, page 8.)

"4. *The 7th floor argument shows no bad faith on Grimshaw's part."* (Reply Brief, page 9.)

Appendix No. 9.

"The Grimshaw Company did not, we respectfully submit, at any point, brief or argue that the trial court erred, in submitting to the jury the question as to whether the subcontract required the Withrow Company to furnish the window sills. When the matter was orally argued, the Court directed no questions to Counsel on that issue of the scope of the contract. * * * Frankly, Appellee feels that it has not been given an opportunity to be heard on the issue which this Court has now made the basis for its decision. * * * Appellee requests therefore that it at least be given an opportunity to submit a supplemental record that will fairly present to this Court the testimony and the exhibits presented to the trial court in connection with this issue." (Petition for Rehearing, pages 3 and 4.)

Appendix No. 10.

"In this case the meaning of the term sills was not clear. It could have referred either to the window sill or to the sill of the window (which is the bottom member of the window frame)." (Petition for Rehearing, page 7.)

Appendix No. 11.

Except for necessary changes on account of the Court being addressed, paragraphs on pages 9 to 11 of the Petition for Rehearing are verbatim with the paragraphs in the Petition for Certiorari beginning at the bottom of page 12 and extending through the second paragraph on page 15.